

NEWS FROM ED MARKEY

United States Congress

Massachusetts Seventh District

FOR IMMEDIATE RELEASE

December 29, 2003

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DOE ROUTINELY REIMBURSES CONTRACTORS WHEN THEY LOSE WRONGFUL TERMINATION, SEXUAL HARASSMENT, AND WHISTLEBLOWER LAWSUITS

Lawmaker decries using tax dollars to cover costs of culpable contractors

WASHINGTON, DC – Rep. Edward Markey (D-MA), a senior Member of the Energy and Commerce Committee, today released a report prepared by the General Accounting Office (GAO) at his request, which found that the Department of Energy (DOE) reimbursed its major contractors over \$330 million in legal fees and settlement costs between 1998 and 2003, even for cases which they lost.

“The GAO found that when a contractor for the DOE gets sued, 95% of the time its legal fees and settlement costs get reimbursed by the Federal Government, whether it wins or loses,” said Rep. Markey. “That means that the American taxpayer foots the bill for almost every lawsuit against contractors, including cases of wrongful termination, sexual harassment, personal injury, and whistleblower retaliation. American taxpayers even pay for penalties and punitive damages awarded by the courts. Contractors should not have a get-out-of-court-free card from Uncle Sam. As long as the American taxpayer is forced to bankroll their legal fees, DOE contractors will have little incentive to act responsibly within the law.”

The GAO report found that the DOE reimbursed contractors for \$330.5 million in legal fees associated with 1,895 cases between fiscal year 1998 and March 2003 (an average of \$174,400 per case). This included \$249.4 million for litigation costs and \$81.1 million for judgments and settlements. During the same period, the DOE estimated that contractors spent only about \$12 million of their own money in legal fees without being reimbursed. In one case of contractor reimbursement, Lawrence Livermore National Laboratory (LLNL) was ordered by a jury to pay \$1 million in damages to Ms. Dee Kotla, who sued the lab for wrongful termination in 1997 following her testimony at a sexual harassment case involving other LLNL workers. LLNL claimed it fired Ms. Kotla for computer and telephone misuse, although her phone bill was only \$4.30. The DOE reimbursed LLNL over \$800,000 in this case and could pay more as it is fully resolved.

The DOE follows reimbursement criteria which result in all contractor litigation costs being covered by the federal government in most cases. The DOE claims it will not reimburse legal fees in cases where a “senior manager” of a contractor is found to have acted in bad faith, displayed willful misconduct, or failed to exercise prudent business judgment. However, only a tiny handful of contractor employees are considered to be “senior management” and the GAO could find only one example between 1998 and 2003 in which a contractor request for reimbursement was refused on these grounds.

The GAO also reported that the University of California, which operates three National Laboratories for DOE, invoked various prosecution-immunity defenses in almost half of all lawsuits from October 1998 to March 2003. In over half of the instances when immunity was invoked, the relevant part of the case was dismissed. In cases involving the Los Alamos and Lawrence Livermore labs, immunity was predominantly invoked to defend against the award of punitive damages; for Lawrence Berkeley lab it was to defend against

employee breach of contract arguments. The immunity defenses included immunity claims invoking the Eleventh Amendment of the Constitution (which immunizes states to lawsuits by private parties in federal courts), sovereign immunity in state court, immunity statutes such as the False Claims Act that apply only to "persons", and restricted lawsuit rights of some state employees to sue the state.

During Energy and Commerce Committee markup of the House version of the Energy Bill (H.R. 6), Rep. Markey successfully introduced language to restrict the reimbursement of legal fees for DOE contractors in cases of whistleblower retaliation. The language has been retained in the House-Senate energy bill conference report, which currently faces an uncertain future due to controversies over unrelated provisions that grant energy industries huge subsidies and exemptions from certain environmental laws.

"Contractors should not pay their legal bills out of the taxpayers' pockets, and they should not be immune from prosecution. I will continue to fight for legislation that will protect the rights of whistleblowers and prevent the wanton use of taxpayer dollars," Rep. Markey concluded.

Additional information is available at <http://www.gao.gov>.

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